

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-1384

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

ESTELLA NAVAS, MARIO NAVAS, and
JOSE RAMIREZ-RIVERA,

Appellants.

Docket No. 76-1384

B

REPLY BRIEF FOR APPELLANTS ESTELLA NAVAS,
MARIO NAVAS AND JOSE RAMIREZ-RIVERA

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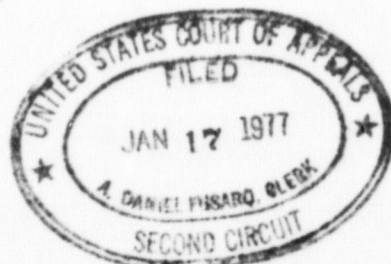


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REPLY BRIEF FOR APPELLANTS ESTELLA NAVAS,
MARIO NAVAS AND JOSE RAMIREZ-RIVERA

POINT I

THE GOVERNMENT CAN NOT ESCAPE THE CONSEQUENCES
OF THE AGREEMENTS IT MADE WITH THE STATE CEDING
EXCLUSIVE JURISDICTION OVER DEFENDANTS.

There is a song "The Games People Play." It is cousin to the "games lawyers play." We add now the "games Government lawyers play."

"Games" truly is the Government's assertion of significance in the fact that Lieutenant O'Shea commanded the arrests; that federal agents were there only to assist; that the arresting officers stated only state violations; that the federal indictment rested also on independent federal evidence; that the state evidence was state property; and so forth and so on. (GBr 32-38).*

* GBr denotes the Government's Brief, DBr our main Brief.

The issue on this appeal is whether the Government must suffer Sixth Amendment consequences as a result of its May and September 1974 agreements ceding exclusive jurisdiction to the State over conspirators named as violators in concurrent federal indictments but not formally indicted. With respect to this crucial issue, except for setting forth the text of the Sixth Amendment in the footnote at GBr 41-42, the Government offers nothing; recognizing, as we submit it must, that on the facts of this case the Sixth Amendment Speedy Trial right must commence with the state arrests (DBr 13-16).*

With that settled, the rest of the Government's argument is sham. Contrary to GBr 42-44, "complexity", "independent federal investigation", and "transcripts of translations" had nothing to do with the delay. State and federal prosecutors, for their own reasons, divided up the defendants, and these defendants went to the state. GBr 34:

"On September 19, 1974, the state and federal prosecutorial agencies entered into a formal agreement designating those persons who would be prosecuted by federal prosecutors and those who would be prosecuted by the New York City prosecutor. The defendants before this Court in this appeal were among those individuals who were to be prosecuted only by the New York City prosecutor."

* After United States v. Cabral, 475 F. 2d 715 (1st Cir. 1973) (GBr 39, DBr 14), United States v. Detienne, 468 F. 2d 15 (7th Cir. 1972) (GBr 40, DBr 15) and United States v. Gravitt, 523 F. 2d 1211 (6th Cir. 1975) which all hold that State arrests may trigger Speedy Trial rights, merely to cite the Sixth Amendment (cont'd)

See also GBr 40: "By express agreement with the State, no charges were to be filed against the defendants by federal authorities after the arrest in 1974". That was the only reason why there was no federal indictment against these defendants for eighteen months.

In this case, then, the delay was "procured by the prosecution." United States v. Roberts, 515 F. 2d 642, 646 (2d Cir. 1975). It was deliberate and inexcusable. Strunk v. United States, 412 U.S. 434, 436 (1973) (intentional delay weighs heavily against the Government); Barker v. Wingo, 407 U.S. 514 (1972) (same). In these circumstances probably six months would have been too long. United States v. Roberts, *supra*. Eighteen months is ridiculously long. United States v. Vispi, 2d Cir., November 15, 1976; United States v. Calloway, 505 F. 2d 311, 316 & n. 6 (D.C. Cir. 1974) (fifteen months; "In this jurisdiction a delay of more than one year raises a speedy trial claim of prima facie merit." "This court has recently viewed with disfavor delays of less than one year").

There remains only the Government's assertion that "there was no prejudice to defendants" (GBr 44). The complete answer is that defendants had no need to show specific prejudice beyond the eighteen months spent in the comforts of state prison, with

* (cont'd)
could hardly dispose of the issue.

The Government advances certain policy grounds in its argument that the state arrest should not start the six month period under the local rules (GBr 38-39). Those arguments have no application to the Sixth Amendment claim. If the Government intended to urge that they do, they are clearly frivolous.

the further threat of federal charges over their heads (they had already been named federally as unindicted co-conspirators).

Moore v. Arizona, 414 U.S. 25,26 (1973):

"Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial.... In addition to possible prejudice, any court must thus carefully weigh the reasons for the delay in bringing an incarcerated prisoner to trial....

"Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to possible prejudice to his defense in those proceedings."

In fact, since the delay was deliberate and attributable solely to the Government, nothing beyond the delay itself was required.

United States v. Hanna, 347 F. Supp 1010 (D. Del. 1972) (eleven month delay "at the instigation" of the Government requires dismissal notwithstanding that delay had resulted in no real prejudice); 1975 U. Illinois. L. F. 1. 57 (1975):

"If the reason for the delay is one that should be weighed heavily against the Government, the lower courts have found a denial of the defendant's right even though he suffered no substantial prejudice."

We close this point correcting the Government's Brief in several aspects:

1. GBr 44 (and the court below A 131) asserts a distinction between this case and United States v. Lara, 520 F. 2d 460 (D.C. Cir. 1975) because there the filing of the second indictment was "wholly within the prosecutor's control". On the contrary, the Government had complete control over the federal indictment here too, outside of the September agreement to leave these defendants to District Attorney Hermann, and defendants are not charged with the consequences of that. The Court's condemnation

of forum selection in Lara is directly applicable here as well.

2. The Government asserts that no hearing was required because defendants were permitted to submit affidavits, to question Lt. O'Shea and Government witnesses about the arrests, and to respond to the Herrmann and Littlefield affidavits (GBr 49-50). The Government adds (GBr 50*): "defendants had not presented the judge with any facts which required or even justified a hearing." The Government is wrong (DBr 19-21). More than that, however, only the Government had the facts on the May and September agreements to divide the defendants (DBr 18), and first it was telling nothing and later only what suited its position. Defendants never had the opportunity to examine Herrmann and Littlefield under oath to ascertain facts to support their contentions.*

We cited before pertinent matters which would have been the subject of inquiry at a hearing, for example why the Gills and Mono were prosecuted in both jurisdictions while these defendants were prosecuted only in one (DBr 19-21). The Government's Brief adds another, sustaining dismissal of our Fifth Amendment claims because of "overwhelming evidence before Judge Carter ... that

* No small measure of what defendants were up against is that the Government made no disclosure whatever of the details of the agreement to divide defendants until after the arguments, oral and documentary (DBr 18-19). For weeks, then, defendants and the district court jostled at windmills while the Government withheld the single most significant consideration on the speedy trial motions. Compare this Court's critical view of the same Assistant's conduct in United States v. DuVall, 2d Cir., February 26, 1976. This total lack of candor should have been enough in itself to mandate a hearing.

the Federal Government had [no] plans to try these defendants until after Justice Coon upheld the suppression motion in the state court" (GBr 48). What "overwhelming evidence"? The reasonable assumption is before entering into the May and September agreements the Government did indeed consider whether they might have to take these defendants back, and did indeed formulate how this could be done. The Hermann and Littlefield affidavits do not deny that this happened. And Prosecutor Fishman of Herrmann's staff asserted at a state suppression hearing that the two prosecutors' offices took up double jeopardy questions at their meetings, confirming the assumption (H. 439-40). In any event the matter is a perfect illustration of our point that the Government has repeatedly made erroneous assertions in areas where it alone has the facts, and that defendants up to now have been precluded from examining the prosecutors who have evidence to challenge those assertions.

3. GBr 45 asserts that Estella's demonstration of prejudice was based on representations of her counsel, not an affidavit from her, and therefore should not be considered. The Government has overlooked her May 13, 1976 affidavit, which was before Judge Carter when he considered the claim (A 121-22). The Government's procedural recitation is also in error (GBr 31). It was Estella, not Mejias, who filed an affidavit of counsel on May 14, 1976 together with exhibits some of which are in the appendix (A 193-233) replying to the Government's May 6 affidavit. On May 18 (H. 226) Judge Carter said that the speedy trial motions were defective as a matter of law except possibly for Estella's

(not Padilla's), and the offer of proof was extended to Estella's counsel (not Mario Navas).

None of this really matters of course because the motions and presentations were deemed made on behalf of all defendants (A 97), and the basic reasons which compelled that the motions be granted applied to all.

POINT II

THE FAULT IN CALLING THE BRAVO I
SENTENCES TO THE DISTRICT COURT'S
ATTENTION WAS NOT DEFENDANTS'.
IN ANY EVENT THE FAILURE TO CONSI-
DER THOSE SENTENCES RENDERS THE
FIFTEEN YEAR TERMS INVALID NO
MATTER WHO WAS AT FAULT.

We address two aspects of the Government's response on sentencing: the impact of the Bravo I sentences, and the alien question.

Failure to Consider the Bravo I Sentences

The Government agrees that Judge Carter did not consider the Bravo I sentences*. It urges, however, that defendants are foreclosed because they "studiously avoided" bringing them to the judge's attention (GBr 97). The argument is nonsense.

In the first instance the Bravo I sentences should have been in the probation report. They weren't. In the second ins-

* Actually the possibility that he did not consider them is enough. United States v. Robin, 2d Cir. October 15, 1976, p. 5834.

tance they should have been in the Government's presentation. They weren't.* If anyone "studiously avoided" the earlier sentences, it was the Government because the five and seven year sentences to Roldan, Velez and Gonzalez (DBr 25) pointed the way to similar terms for most of the Bravo II defendants, and the Government was out for much more. It was obviously to defendants' advantage to call the earlier sentences to the court's attention. They didn't only because they had no idea Judge Carter would blatantly disregard every pertinent individual factor and impose maximum terms across the board. Once they found out, it was too late. Judge Carter made quite clear he would listen to no further argument (4220).

All counsel, moreover, were so shocked by the severity of the sentences that they were in no frame of mind to advance Bravo I to a court who wanted to hear nothing further.**

Even if defendants were at fault (and clearly they were not), that would not aid the Government. Failure to consider vital information is grounds to upset the sentence no matter who is to blame. United States v. Robin, supra (defendant's lack of reasonable time to rebut presentence report and state prosecutor's letter requires reversal notwithstanding that counsel did not claim lack of time to examine the report and was at fault in not responding to the letter since he received it two weeks

* Only the Government had been a party to Bravo I. The same Assistant tried both cases.

** Except for counsel for Estella, none of the attorneys in Bravo II was in Bravo I.

before sentence, p.5843 & n.3). The argument applies here with special force because of the severity of the sentences, and because the Probation Office and the Government were also at fault in not disclosing the earlier sentences, and their duty in this regard was much higher than defendants'. See United States v. Robin, supra, p. 5836 (presentence reports "are heavily relied upon by sentencing judges." Their accuracy "is therefore of prime concern." In addition "The harsh sentence obviously contemplated ... should have made the court still more sensitive to the need for a careful inquiry").

The Government's second argument -- that Judge Carter could not have been bound by the earlier sentences (GBr 97) -- is equally frivolous. It is not the binding effect of what is advanced that makes the sentence invalid but the failure even to consider it. The failure, moreover, went in this case to an issue which is at the heart of sentencing, disparity. (DBr 24-25). United States v. Robin, supra ("disparities in sentences ... are of serious concern to those involved in the judicial system"; Court insists that where disparate sentence results, strong foundation for them be shown); United States v. Baker, 487 F. 2d 60 (2d Cir. 1973) (disparate sentences in draft evasion cases).

Sentencing Based on Alienage

On January 10, 1977 the Supreme Court affirmed the decision of a three judge court in the Eastern District (Gurfein and Neaher; Platt dissenting) that a New York Statute providing preference in

employment to New York State citizens was unconstitutional. C.D.R. Enterprises Ltd. v. Board of Education, 412 F. Supp. 1164 (E.D.N.Y. 1976). This decision, following Sugarman v. Dougall, 413 U.S. 634 (1973) (competitive appointments limited to U.S. citizens unconstitutional), In re Griffiths, 413 U.S. 717 (1973) (admission to bar limited to citizens unconstitutional) and other decisions cited at DBr 26 leaves no doubt, we submit, that if the district court imposed more severe sentences based on the fact that defendant were aliens, the sentences would be invalid.

Recognizing the point the Government stresses that defendants were "illegal aliens." Even if the distinction had some validity in employment cases, illegal aliens, no less than legal aliens, are entitled to no worse treatment than citizens under the criminal law. United States v. Wong Dep Ken, 57 Fed. 206, 211-12 (S.D. Cal 1893). ("I am unable to appreciate the force of the suggestion made by the district attorney that the provisions of the federal constitution apply only to citizens of the United States and to aliens permissively therein, and that its protections and safeguards cannot be invoked by an alien who came into and remains in the country in violation of the express laws of the country"). The district court, moreover, made no distinction between legal and illegal. His remarks were that the fifteen years followed because defendants were aliens (A 147)*.

* Further evidence that the district court saw the sentence in terms of aliens, not illegal aliens, is found in the Government's assertion that the sentence was "a deterrent to crime by foreign nationals," (emphasis supplied) (GBr 102).

The Government's justification for disparate sentencing of aliens as such (GBr 101) is no more justification than the various grounds for distinction advanced and rejected in C.D.R. Enterprises, Sugarman, Griffiths, Graham and others. Citizens as well as aliens seek to "avoid detection by law enforcement authorities, including frequently making changes of identity and residence" (GBr 101). Contrary to the Government there is not an iota of evidence to support an assertion that detecting this organization's activities was more difficult than an organization run by American citizens. Citizens as well as aliens, may have little community roots and family ties, no employment and care little about voting.* See Sugarman v. Dougall, 413 U.S. at 645 (refusing to accept general comparisons disparaging to aliens). Aliens, indeed, may suffer more than a citizen from the conviction because they lose their right altogether to live in this country, whether lawfully or unlawfully. For defendants from countries with high poverty levels, this is a real deprivation.

In short, the classification the district court (and now the Government) made cannot stand; no authority the Government now cites (GBr 102) even remotely sustains it; and the sentences based on it are invalid and must be overturned.

* Actually the Government's assertion that aliens, even illegal aliens, lack family ties or roots here is clearly wrong.

POINT III

THE GOVERNMENT HAS NOT ANSWERED THE
ARGUMENT ON PROSECUTORIAL MISCONDUCT

The points in the Mejias and Salazar Brief about prosecutorial misconduct apply equally to all defendants, including Mario, Estella and Ramirez, and a reversal on that ground must extend to them as well. The Government's answer (GBr Point VI) is unsatisfactory and should be rejected.

These appellants are also entitled to the benefit of any other points for reversal to the extent applicable.

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